OCT 28 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-487

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY,

Petitioner,

v.

ARTHUR LAWRENCE ABRAMS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

NEW JERSEY STATE BAR ASSOCIATION, *AMICUS CURIAE'S* BRIEF IN OPPOSITION

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Preliminary Statement

The New Jersey State Bar Association herein presents its brief as *amicus curiae,* in accordance with United States Supreme Court Rule 42(1), prior to the considera-

tion by this Court of the petition for certiorari, heretofore filed by the petitioner.

The consent of the parties has been obtained pursuant to Rule 42 (1), and letters of consent have been filed with the Clerk of the Supreme Court.

Counter-Statement of Questions

When an attorney has been disciplined by a state court for professional misconduct on the basis of a presentment of the county Ethics Committee, and a United States District Court thereafter seeks to discipline that attorney on the basis of the same record:

(a) may the court of appeals, on review, reverse the district court for procedural errors resulting in a denial of due process, and

(b) may the court of appeals, on review, reverse the district court for incorrect precedential reliance?

Interest of the New Jersey State Bar Association

This is the first recorded instance where the District Court in New Jersey has meted out a more severe disciplinary sanction to an attorney than the State Supreme Court on the identical record used by the state court. Obviously, such a result has important ramifications not only for the members of the Association but for the entire bar as well. In order to insure that in such cases the appropriate procedural process is followed by the District Court, the Association continues to participate.

Statement

In 1973, the Essex County Ethics Committee charged the respondent, Arthur Lawrence Abrams, with various ethical violations stemming from his activities for Port Jersey Corporation. In reviewing those charges, the New Jersey Supreme Court concerned itself only with Abrams' participation in a $20,000 payment to Jersey City officials. The presentment of the county Ethics Committee originally contained a finding that the sharing of a real estate commission by Abrams violated New Jersey law, but this charge was later withdrawn by the Committee and was not considered by the New Jersey Supreme Court. In an opinion rendered on June 4, 1974, the Supreme Court of New Jersey suspended the respondent from the practice of law for one year. 65 N. J. 172 (1974).

Thereafter, the Federal District Court for the District of New Jersey instituted disciplinary proceedings against the respondent pursuant to Local Rule 7. Generally the disciplinary proceeding of the Federal Court required by Local Rule 7 relies heavily on extensive hearings conducted by the various state investigatory bodies, County Ethics Committees, and the opinions of the Supreme Court of New Jersey. In this case, the Federal District Court and the State Supreme Court both relied on the record developed by the Essex County Ethics Committee. The majority of a divided district court, considering the charge presented to the Supreme Court, as well as charges either withdrawn or never considered by the county Ethics Committee, concluded that the respondent should be disbarred rather than suspended and entered an order to that effect. 385 F. Supp. 1210 (D. N. J. 1974).

On June 30, 1975, the United States Court of Appeals for the Third Circuit reversed the decision of the district

court. Four separate opinions were filed. The thread common to all was the conclusion that the district court failed to follow its own rules in the conduct of the proceeding. *In re Abrams,* No. 75-1029 (3rd Cir., filed June 30, 1975).

ARGUMENT

The petitioner initially contends that the court of appeals concluded "that it was impermissible for the district court to disagree with a state court determination as to the discipline to be imposed upon an attorney who was clearly proven to have been guilty of serious misconduct. . . ." (Petition for Writ of *Certiorari,* 20). This was simply not the holding. At no time did the court of appeals question the power of the district court to impose a different quantum of discipline than the state court, or make a different legal analysis than the state court. On the contrary, the court of appeals expressly recognized such rights in its opinion,* but reversed the holding of the district court because of serious procedural deficiencies which will hereafter be discussed.

Petitioner next argues that the court of appeals' decision concerning the applicability of state law was incon-

*"We acknowledge the right of the district court 'to discharge [an] independent obligation' and to 'take appropriate action on its own rational analysis and determination.' We further acknowledge that the 'appropriate action' may be at variance with that taken by the state court system. We also acknowledge that the district court may draw inferences from 'facts and circumstances' which differ from those drawn by the state. Especially do we believe that the district court may emphasize countervailing federal considerations. [citations omitted] But 'appropriate action' must always embody a proper application of governing legal precepts. We conclude that the district court's action was deficient in this respect." (Appendix A, Petition for Writ of *Certiorari,* 20a).

sistent with prior precedent. That court did not hold, as the petitioner asserts (Petition for Writ of *Certiorari,* 25), that the district court was bound by state law. On this subject, the court of appeals said:

> In the context of its announced objective to 'hold the greatest respect for, and give due weight and consideration to, the views of the [New Jersey] Supreme Court,' the district court was not free to rely upon *Colsey* for New Jersey precedential guidance. Having elected to bottom its own rational analysis on New Jersey law, the controlling case for the district court was *In re Abrams*—not *In re Colsey.* And, in *Abrams,* the New Jersey Supreme Court explicitly concluded that *Colsey* was distinguishable. . . . Whatever freedom the district court possessed independently to draw inferences from the facts and circumstances, the court could not, with fealty to consistency, disregard the interpretation of New Jersey state law by that state's highest court and at the same time profess to 'hold the greatest respect for, and give due weight and consideration to, the views of the [New Jersey] Supreme Court,' (Appendix A, Petition for Writ of *Certiorari,* 21a).

Thus the error which the court of appeals was correcting did not involve choice of law but consistent application of the law once chosen. The court of appeals clearly has the power to reverse the district court for an erroneous interpretation and application of the law. The court of appeals concluded that the district court had applied a faulty legal analysis by purporting to rely on state law while ignoring the controlling case, namely, *In re Abrams.* In so doing, the court of appeals was properly exercising its jurisdiction.

Petitioner also argues that the decision by the court of appeals has expanded the scope of review in discip-

linary matters. This expansion is said to have occurred because the court of appeals reviewed the procedures followed by the district court in addition to the result achieved. Relying on *Ex Parte Burr*, 22 U. S. (9 Wheat) 529 (1824), petitioner contends that the scope of appellate review in disciplinary proceedings is confined to the "narrow limits of clear abuse of discretion."* That argument must be premised on the mistaken notion that misapplication of a court rule can never be an abuse of discretion.

Local Rule 7(2)(b) of the New Jersey District Court provides for disciplinary proceedings of one who has been disbarred or suspended from practice in any state. Insofar as the district court based its authority on Rule 7(2)(b), the matters considered should have been restricted to those considered by the state court, because the Rule 7(2)(b) proceeding is derivative in nature.** In-

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* Petitioner's reliance on *Burr* is misplaced, for this Court there recognized a reviewing court's right to interpose for irregularities in the "mode of proceeding" by the disciplinary court. See *Ex Parte Burr*, supra at 531.

** Although choosing not to invoke it, the district court also had available Rule 7(2)(d). That rule provides for disciplinary action of one who is "guilty of conduct unbecoming a member of the bar of this court." Such proceedings are governed by Rule 7(4), which provides:

> [P]roceedings relating to 'conduct unbecoming a member of the bar of this court' 'shall be presented to the chief judge, and, if he deems the charges of professional misconduct of sufficient weight, he shall refer them for preliminary investigation and recommendation to a committee of members of the bar of the court designated by him or to the United States Attorney.'

The district court chose not to follow this procedure, thereby precluding reliance on Rule 7(2)(d).

stead, the district court considered two charges which were not before the state court, to wit, the alleged sharing of a brokerage commission and acquisition of an interest in Abrams' client's business. In so doing, the district court violated the rule early stated by this Court that

> [B]efore a judgment disbarring an attorney is rendered, he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense. This is a rule of natural justice and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property. *Ex parte Robinson*, 86 U. S. (19 Wall) 505, 512 (1873).

Since then, this Court has consistently held that a lawyer in a disciplinary proceeding is entitled to procedural due process, including fair notice of the charges. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232 (1957); *In re Ruffalo*, 390 U. S. 544, 550 (1968).

Petitioner seeks to create an alleged conflict between the Third Circuit and the District of Columbia Circuit by contrasting *In re Abrams* with *In the Matter of Richard G. Kleindienst*, No. S-37-75 (D. C Cir., filed August 11, 1975). These two cases, however, are inopposite. The sole issue before the Third Circuit was whether reversible error had been committed by the lower court. In *Kleindienst*, there was no question of the failure of a lower court to follow its own rules or correctly apply state law. Moreover, the primary question in the *Kleindienst* case, the right to practice before the court of appeals, was explicitly stated *not* to be at issue in *Abrams*:

> [P]reliminarily we emphasize that which is before us and that which is not. We are not to decide

> Abrams' right to practice in this court. (Appendix A, Petition for Writ of *Certiorari,* 11a).

Because the Third Circuit recognized that in certain circumstances different quantums of discipline might be imposed by different courts, there is no possible conflict.

In summary, despite petitioner's repeated attempts to characterize the opinion otherwise, the court of appeals simply acted to reverse the district court because of its failure to act within recognized procedural and legal standards. Such a decision causes no conflict within the circuit courts, does not conflict with state law, and clearly does not present any federal question. In such a circumstance, petitioner has failed to show any reason for granting *certiorari.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of *certiorari* should be denied.

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